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No. 86-1564

In The

Supreme Court of the United States

October Term, 1986

THE SPENCER COUNTY CLERK, SPENCER COUNTY AUDITOR, SPENCER COUNTY COUNCIL, AND THE SPENCER COUNTY BOARD OF COMMISSIONERS,

Petitioners,

v.

B & M COAL CORPORATION,

Respondent,

and

UNITED MINE WORKERS OF AMERICA AND DAVID R. NORRICK, INDIVIDUALLY AND AS A MEMBER OF THE UNITED MINE WORKERS OF AMERICA, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF CASE

The respondent, B & M Coal Corporation, agrees with the Statement of the Case and the Statement of Facts material to the issue provided by the petitioner. The following facts are relevant to this issue, however, and were omitted from petitioner's Statements.

As stated by petitioner, the interest money retained by Spencer County in the amount of $33,440.43 was paid into the county general fund prior to the Spencer County Circuit Court's Order of February 24, 1982. However, that money has been reappropriated by the county for repayment on an annual basis (Record, p. 202).

Reference was made in petitioner's Statement of Facts to work which the Clerk was required to do after Spencer County intervened in this case on April 20, 1982. (Petition, p. 22). The reference to the Clerk being "required to confer with attorneys, State Board of Accounts, give a deposition, appear before the County Commissioners, testify in Court and numerous other matters all relating to the appeal bond" does not apply to services rendered by the Clerk concerning the investment of the appeal bond. Rather, this refers to efforts made on behalf of Spencer County to retain the money which they appropriated without the consent of either plaintiffs or defendants to the original lawsuit. (Record, p. 190).

To date, B & M Coal Corporation has received $191,876.97 toward the payment of its judgment of $222,232.43, leaving $30,355.46 plus accrued interest unpaid.

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SUMMARY OF ARGUMENT

The issue before the Court is whether Spencer County's unauthorized retention of interest money earned on an appeal bond, deposited with the Spencer County Clerk, violates the constitutional proscription against governmental appropriation of private property with just compensation or due process.

B & M Coal Corporation argues that the decisions of the Indiana Court of Appeals, First District and the Indiana Supreme Court are correct. B & M had a protectable property interest in the bond money and all interest earned thereon. The bond was originally posted to guarantee the satisfaction of B & M's judgment, plus cost, interest and damages for delay. The only way that B & M Coal Corporation's judgment could ever be protected and paid would be for all interest on the original bond to be repaid as ordered. This rule would apply, however, regardless of the actual amount of the bond paid, due to the uncertainty of the length of the appellate process and the fact that interest continues to accrue on a judgment during the time that the appeal is processed.

Spencer County, acting under the apparent authority of I.C. 5-13-1-3.5(b) has deprived B & M Coal Corporation of money which could and should have been used to satisfy its ultimate judgment against the defendants. The county did so without notice to the parties hereto or the Court. As such, it developed and maintained a prohibitive interest in this lawsuit. The longer that litigation continued and the bond was left with the Clerk, the more money the

county stood to receive. The County's acts are, therefore, unconstitutional.

———o———

ARGUMENT

SPENCER COUNTY'S RETENTION OF INTEREST MONIES CONSTITUTES A VIOLATION OF B & M'S DUE PROCESS RIGHTS

The *Fifth Amendment to the United States Constitution* provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . ., nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section I of the Fourteenth Amendment to the United States Constitution provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 21 of the Indiana Constitution provides as follows:

> No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except

in case of the State, without such compensation first assessed and tendered.

The foregoing sections of the Federal and State Constitutions have been held to prevent the State from exercising, by way of any of its departments, arbitrary and capricious power over persons or property. *Jeffries v. Turkey Run Consolidated School District* (1974) 492 F.2d 1. Further, these constitutional guarantees have been construed to provide that a person may not be deprived of his property or the use thereof without due process of law. *Eichman v. Indiana State University Board of Trustees* (1979) 597 F.2d 1104.

Before a person can raise a constitutional objection to a statute, he must demonstrate that some right of his is impaired or prejudiced by the statute. *Board of Commissioners of Howard County v. Kokomo City Plan Commission* (1975) 263 Ind. 282, 330 N.E.2d 92. For standing under the Federal Constitution, the standard has further been defined as whether a party has alleged such a personal stake in the outcome of litigation as to insure concrete adverseness which sharpens the presentation of issues and on which a court largely depends for elimination of difficult constitutional questions; furthermore, a party must just show that it is injured by the challenged action. *Lutheran Hospital of Fort Wayne, Inc. v. Department of Public Welfare of Allen County* (1979) — Ind. App. — 397 N.E.2d 638.

B & M has standing under both the Federal and State constitutional provisions to challenge the constitutionality of Spencer County's acts in retaining the interest money earned on the appeal bond. B & M had received a judg-

ment ultimately from the named defendants in this suit totaling $222,232.43. The original amount of the bond money posted was only $160,363.00. There had been an accrual of interest to this original bond after February 24, 1982, making the total received by B & M in partial satisfaction of their judgment of $191,876.97. Consequently, B & M has been shortchanged by at least $30,000.00 in the payment of their judgment. The retention of the additional interest monies earned on the bond by Spencer County has directly caused this shortcoming. The bond and earned interest would have otherwise been sufficient to satisfy B & M's ultimate judgment. This shortcoming subjects B & M to the uncertainties and other problems associated with trying to collect a large sum of money from numerous, scattered and often insolvent individuals. The original appeal bond was posted for the purpose of protecting B & M's judgment for the costs, interests and damages for delay inherent in an appeal. See, *Trial Rule 62(D)(2)* of the Indiana Rules of Trial Procedure. Spencer County's actions have undermined the guarantees intended by this Trial Rule and have directly impaired protections owed to this plaintiff. Therefore, standing exists to raise the constitutional question.

For the protection of the due process clause of the Federal and State Constitutions to apply, an individual must have a protectable property interest. *Davis v. Ball Memorial Hospital Association* (1980) 640 F.2d 30. A protectable property interest is created and its dimensions are defined by existing rules or understands that stem from an independent source, such as state law. *Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548. Further, a protectable property in-

terest may arise from a statute. *Natural Resources Commission of Department of Natural Resources v. Sullivan* (1981) — Ind. App. —, 428 N.E.2d 92. It has been held by Indiana courts that a right to recover damages for an injury constitute property in due process clause adjudications. *Griffin v. Wilcox* (1863) 21 Ind. 370.

In establishing the existence of a protectable property interest, B & M employs an argument very much akin to that used in establishing its standing to assert the constitutional questions. As noted above in *Griffin,* B & M's right to damages for injuries is a protectable property interest. In light of this existing authority and the express terms of *Trial Rule 62(D)(2)* of the Indiana Rule of Trial Procedure, B & M asserts that it has a bona fide, protectable, property interest in the appeal bond posted by the defendants herein and all interest monies earned on that original bond. *Trial Rule 62(D)(2)* provides in part that:

> Whenever an appellant entitled thereto desires a stay on appeal, he may present to the appropriate court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and

for good cause shall affix a different amount or orders security other than the bond.

Since B & M's right to sue and recover damages for injuries is a protectable property interest, then its interest in the appeal bond and the interest earned thereon specifically posted to protect its interest in a judgment awarding damages can be no less protected.

For a violation of the due process protections to be found, there must occur a "taking or deprivation" of B & M's property rights. This certainty occurred when the County, without notice or opportunity for hearing, began taking the interest money earned on the original appeal bond. An actual interference with or disturbance of property rights, not causing a merely consequential or incidental injury, constitutes a "taking" within the due process guarantee. *School Corporation of Andrews v. Heiney* (1912) 178 Ind. 1, 98 N.E. 628. Such surely occurred here.

The original trial court and the Court of Appeals has jurisdiction over stays of execution and appeal bonds. See, *Trial Rule 62* of the Indiana Rules of Trial Procedure and *Appellate Rule 6* of the Indiana Rules of Appellate Procedure. The Spencer County Clerk did not have the authority to withdraw any monies whatsoever from the accounts in which the bond is invested, including but not limited to any interest monies which might be earned, without prior court approval. The provisions of *Trial Rule 67,* of the Indiana Rules of Trial Procedure would show by analogy how the appeal bond monies should be processed. This rule provides in Section (A) the following:

"Payment of all or part thereof (referring to a deposit in court before judgment) may be directed by

> the court under any judgment or order, or motion and hearing to the rightful owners or upon security or agreement of the parties under the direction of the court."

Spencer County had no legally cognizable interest in the bond money and the interest earned thereon. The only parties with a protectable property interest in these monies were the plaintiff and perhaps the defendants. The plaintiff's interest arose as a result of their judgment and the existence of the bond. The defendants' interest could possibly arise as a result of their expectation of a return of money to them should the amount of the bond exceed the actual amount of the judgment and other costs assessed. Consequently, a "taking or deprivation" of the parties protected property interest in the interest money has occurred. The only possible reason that Spencer County can claim for keeping the interest is that the money withheld repaid the County for supervising the investment of the appeal bond herein. Such an argument is unfounded in statute or case law. The County is attempting to profit from its fiduciary responsibility in safeguarding the appeal bond herein. Such profit is not right.

Monies were received and processed by the Spencer County Clerk's Office and the interest earned on investment paid to the County between the time period of February 27, 1979 and the first part of February, 1982. During this period of approximately 36 months, the Spencer County Clerk's Office routinely invested the money in certificates of deposit, received interest checks, maintained their own ledger books and reconciled their records with the bank records on the flow of monies and had a small

amount of conversation with bank personnel and other persons about the investment of this money.

A description of Circuit Court Clerk's duties and court fees is found in *I.C. 33-17-1-1* et seq. *I.C. 33-17-2-7* provides that:

> (a) The Clerk shall keep in his office and open to public inspection a book to be known as the official bond index record.
>
> (b) In the official bond index record the Clerk shall keep, in alphabetical order, an index of the names of all sureties on any and all bonds of every description filed in his office, indicating the character of such bond upon which such surety appears and a reference to the book and page where such bond is recorded.
>
> (c) The official bond index record shall be procured by the Clerk at the expense of the county. (This section recodified the former statutes found at *I.C. 33-15-12-1).*

Under this statute and its predecessors, there is no mention of a separate fee to be charged for these routine services.

A further constraint on the imposition of fees by the Spencer County Clerk is found at *I.C. 33-17-1-6.* This statute provides that:

> A Clerk shall post in a conspicuous place in his office a table of his fees. If he fails to post a table of fees, a Clerk is not entitled to demand or receive fees for services that he renders. (This statute recodifies the former statute *(I.C. 33-1-11-6).*

Finally, *I.C. 33-17-5-8* provides as follows:

> For his services in a proceeding not specifically provided for in this chapter or in *I.C. 33-17-4,* the Clerk shall charge and collect the same service fee as is pre-

> scribed in this chapter for similar proceedings. (This statute is a recodification of the last section of former statute *I.C. 33-1-11-1)*.

The Spencer County Clerk is not authorized to withhold or charge fees for its management of appeal bonds. There is no provision for the charging of such a fee under current or former statutes. When one reviews the duties of the Clerk, it is clear that this is something that she is required to do by statute and for which she is compensated by salary. Likewise, her staff is compensated by salary for their efforts in this area. Should the Clerk be compensated for her services herein, the statute limits the charge to that prescribed for similar services. B & M would argue that the activities which most closely resemble that performed by the Clerk in this matter would be receipting in child support payments and the subsequent payment of these amounts to custodial parents. This latter activity involves comparable management of money, bookkeeping and issuance of receipts. The only difference is that support payments are generally handled on a weekly basis and the interest payments received from the appeal bond were generally processed monthly. In terms of the total hours of work necessary to handle these types of accounts, it would appear that a child support account would likely involve more time than that required for the management of the appeal bond. The fee for managing child support accounts was instituted in 1984 and is currently the sum of $15.00 per calendar year. See, *I.C. 33-17-6-2.* During the time that the appeal bond was being invested by the County Clerk, there was no charge for the Clerk's services in managing support accounts.

The foregoing analysis of the Clerk's duties and the fees which she can charge shows very clearly that the monies withheld by Spencer County in this matter were not intended to be and cannot be construed to be fees for services rendered. Therefore, the money in question was "taken" for purposes of due process analysis.

All interest earned on the appeal bond prior to the court's order of February 24, 1982 went into the County's general revenue fund, allegedly pursuant to *I.C. 5-13-1-3.5(b)*. This statute reads as follows:

> (b) The Clerk of any Circuit Court of this state may invest any or all of his total monies on deposit. He shall invest this money in any or all of the kinds of investments permitted in this chapter. He shall credit interest on these investments to the County general fund of his County.

The Supreme Court of the United States had the occasion to discuss a similar statute in the case of *Webbs Fabulous Pharmacies v. Beckwith* (1980), 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358. In an opinion written by Justice Blackmun, the court held that a very similar Florida statute allowing the Clerk of the Circuit Court to retain interest money earned on monies deposited was unconstitutional.

The *Webbs* case involved the deposit of monies into the Circuit Court Clerk's office in conjunction with the filing of a complaint of interpleader in that court. The Clerk deducted from the interpleader various amounts of interest pursuant to Florida Statute Section 28.33. This statute reads in part:

> Monies deposited in the registry of the court shall be deposited in interest bearing certificates at the direction of the Clerk, subject to the above guidelines . . . all interest accruing from monies deposited shall be deemed income of the office of the Clerk of the Circuit Court investing such monies and shall be deposited in the same accounts as are other fees and commissions of the Clerk's office. Each Clerk shall, as soon as is practicable after the end of the fiscal year, report to the County governing authority the total interest earned on all investments during the preceding year. *Webbs,* 101 S.Ct. 446, 448.

During the course of this litigation, the Clerk in the *Webbs* case retained interest exceeding $90,000.00. The argument was raised in *Webbs* that the retention of the money by the County Clerk was unconstitutional, being in violation of the Fifth and Fourteenth Amendments of the United States Constitution. The trial court agreed with this argument and ordered the monies returned by the Clerk. However, the Florida Supreme Court in a per curiam opinion ruled that Florida Statutes Section 28.33 was constitutional and reversed the judgment of the Circuit Court. See, *Webbs Fabulous Pharmacies v. Beckwith* (1979), 374 So.2d 951. The rationale behind this opinion was that a fund so deposited is considered "public money" from the date of deposit until it leaves the account; that the statute takes only what it creates; and that there is no unconstitutional taking because interest earned on the Clerk of the Circuit Court's registry account is not private property. 374 So.2d 951, 952-953. This matter was subsequently appealed to the United States Supreme Court which assumed jurisdiction.

The Supreme Court noted at the outset that it had held elsewhere that a County's appropriation of the in-

terest earned on private funds deposited in court in an interpleader action is an unconstitutional taking. *Webbs,* 101 S.Ct. 446, citing *Sellers v. Harris County* (1972), 483 S.W.2d 442; *McMillan v. Robeson County* (1964), 262 N.C. 413, 137 S.E.2d 105.

The Circuit Court Clerk in the *Webbs* case had deducted a fee for services rendered of $9,228.74. In addition, it retained all interest earned on the interpleader deposit, which interest exceeded $90,000.00. The Supreme Court considered only the issue of whether the retention of the interest money over and above any fees charged constituted a taking within the Fourteenth Amendment proscription. The court cited Florida law and other law in finding that the principal sum deposited in the registry of the court plainly was private property, not the property of Seminole County. *Webbs,* 101 S.Ct. 446, 450. The court continued on finding that *Webbs'* creditors, represented by the court appointed receiver had more than a unilateral expectation in the property. The fund was determined to be held only for the ultimate benefit of *Webbs'* creditors, not for the benefit of the court or County. The court further found that the lack of immediate right to claim the fund does not automatically bar a claimant ultimately determined to be entitled to all of her share of the fund from claiming a proper share of the interest. The court went on to state that the usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal. *Webbs,* 101 S.Ct. 446, 451. Finally, the Supreme Court held the statute in question to be unconstitutional finding that the County is forcing some people alone to bear public burdens

which, in all fairness and justice, should be borne by the public as a whole. *Webbs,* 101 S.Ct. 446, 452.

As mentioned before, the court decided only the issue before it. It expressly refrained from deciding what occurs when the interest retained is the only money earned for the services rendered. However, the findings by the court that the original fund was a private fund and that the interest on that fund followed the principal would mitigate very strongly against a contrary result in the latter situation. Indeed, the concerns expressed by the court strongly indicate that the result would be the same should a fee not have been charged by the Seminole County Clerk. The court's concern that the County officials "would feel an inherent pressure and possess a natural inclination to defer distribution, for that interest return would be greater the longer the fund is held; there would be, therefore, a built in disincentive against distributing the principal to those entitled to it" still applies should a fee not have been paid. Likewise, the arbitrary conversion of private property into public property without compension would still exist and would still be in the words of the *Webbs* court "the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webbs,* 101 S.Ct. 446, 452.

The only differences between the *Webbs* case and the instant case is that *Webbs* involved an interpleader fund while this case involved an appeal bond and the Clerk in *Webbs* deducted monies for services rendered while the Clerk in this case has not expressly done so. The difference in the designation of the funds is inconsequential in that the purpose for the funds is exactly the same in both

cases. An interpleader fund is to be held for third persons which in the *Webbs* case turned out to be creditors. The appeal bond in this case was set aside for the protection of the judgment holder with any remaining monies to be returned to the defendant. In neither case did the state have any interest whatsoever. Both cases are further similar in that the claim of property right was not fully matured at the time the interest was withheld, but depended upon an ultimate determination as to the amount of money that each individual was to receive. Finally, both cases are similar in that the money withheld by the County bore no rational relationship to the services provided. As noted above, the reasoning used by the court in deciding the *Webbs* case mitigates very strongly against a contrary result even if the Clerk had not withheld fees. The concerns that the court voiced still exist when no fees were charged. For these reasons, B & M asserts that *Webbs* compels the determination that *I.C. 5-13-1-3.5(b)* is unconstitutional in the setting involved in the instant case.

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CONCLUSION

Spencer County has wrongfully appropriated $34,440.43 of interest money rightfully belonging to B & M. This appropriation of monies works a severe injustice on B & M in that the likelihood of its receiving full compensation for the injuries inflicted upon it by defendants is severely impaired by the County's retention of these monies. The record shows that the interest monies are needed to make up the difference between B & M's judg-

ment and the amount that it has received to date. This taking constitutes a violation of B & M's due process rights. For these reasons and to prevent counties from developing and maintaining an undesirable and counterproductive interest in litigation, B & M respectfully requests that this court deny Spencer County's Petition for Writ of Certiorari.

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Richard S. Eynon